

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 CMG HOLDINGS GROUP, as  
4 successor to XA The  
5 Experimental Agency, Inc.,

6 Plaintiff,

7 v.

15 Civ. 5814 (JPO)

8 JOSEPH WAGNER, et al.,

9 Defendants.

Conference

10 New York, N.Y.  
11 April 12, 2018  
12 11:40 a.m.

13 Before:

14 HON. J. PAUL OETKEN,

15 District Judge

16 APPEARANCES

17 EDWARDS POTTINGER LLC  
18 Attorneys for Plaintiff  
19 BY: SETH M. LEHRMAN

20 WINDELS MARX LANE & MITTENDORF LLP  
21 Attorneys for Defendants  
22 BY: SCOTT R. MATTHEWS  
23  
24  
25

1 (Case called)

2 MR. LEHRMAN: Good morning, your Honor, Seth Lehrman  
3 appearing for the plaintiff and third-party defendants.

4 THE COURT: Good morning.

5 MR. MATTHEWS: Good morning, your Honor, Scott  
6 Matthews for all defendants and third-party plaintiffs.

7 THE COURT: Good morning. You can be seated.

8 We are here to discuss a series of discovery disputes  
9 reflected in the letters I received basically in March of this  
10 year.

11 Mr. Lehrman, are you at Farmer Jaffe or Edwards  
12 Pottinger?

13 MR. LEHRMAN: I'm at the Edwards Pottinger firm. I  
14 formerly practiced with Farmer Jaffe. That firm is dissolving.  
15 Mr. Edwards and I, my cocounsel, are now partners at this new  
16 firm.

17 THE COURT: You can all remain seated. Pull the mics  
18 right in front of your face.

19 I've extended discovery in this case. Depositions  
20 will be completed June 29. All fact discovery also completed  
21 June 29. Expert discovery to be completed October 8 of this  
22 year.

23 You all haven't had any settlement discussions. Do  
24 you still have a mediation scheduled in May?

25 MR. MATTHEWS: Your Honor, the Court's order requires

1 that we conduct private mediation in the middle of May.

2 Counsel and I have been discussing settlement informally, and  
3 we would like to have the case referred to a magistrate judge  
4 to conduct a settlement conference. We think that would be  
5 more useful than a private mediation.

6 THE COURT: Do you agree?

7 MR. LEHRMAN: I do agree.

8 THE COURT: I can do that. I'll have to get a  
9 magistrate judge designated. I am not sure. It will probably  
10 be one of the new magistrate judges because Judge Ellis, who  
11 was originally designated, has retired. It might be Judge  
12 Aaron or one of the other ones. I'll go ahead and do that.

13 Defense counsel, Mr. Matthews, you've raised a number  
14 of issues with regard to plaintiff's production and then  
15 plaintiff has raised some issues with regard to defendants'  
16 production.

17 Let's start with defendants' letter which came first.  
18 What would you like to discuss first?

19 MR. MATTHEWS: Thank you, your Honor. We have been  
20 seeking to obtain documents from the plaintiff and plaintiff's  
21 principal, Glenn Laken and his daughter, Alex Laken, the  
22 president of the company, for years, only to be met with  
23 refusals and statements that are demonstrably false. We are  
24 seeking communications regarding XA's finances, communications  
25 made during this purported investigation of my client's actions

1 following their resignation from XA, submissions of coded  
2 American Express charges made by Mr. Laken and Ms. Laken, and  
3 records of Mr. Laken's trading activity in the CMGO stock.

4 We want these documents so we could prove that the  
5 plaintiff at all times knew of defendants' lawful actions, that  
6 there is no basis for the allegations in the complaint, that  
7 Mr. Laken and Ms. Laken themselves acted in the same way in  
8 which defendants did with respect to business expenses, and  
9 that Mr. Laken is using this lawsuit as a means to prop up the  
10 price of the CMGO stock.

11 The Court heard argument on this on May 3, 2017. The  
12 Court granted our motion to compel Mr. Laken to produce  
13 documents that support our unclean hands defense, and he has  
14 failed and refused to do so. He has produced certain trading  
15 records of the CMGO stock, but he stops producing records after  
16 2014. It's simply inconceivable that Mr. Laken, who became  
17 chairman and CEO of this company as a result of amassing enough  
18 stock to throw out the prior board, suddenly stops trading  
19 stock in the company and doesn't have access to those records.  
20 What he did was he produced records from four or five different  
21 trading houses. They all stop in 2014 and now he claims that  
22 he doesn't have possession, custody or control of additional  
23 records. The suggestion is preposterous on its face.

24 In addition, he has not produced e-mail records  
25 concerning this investigation. The defendants resigned their

1 employment. Mr. Laken's wife, Barbara Laken, conducted an  
2 investigation with the aid of an IT professional. She didn't  
3 produce any documents in response to a subpoena that was issued  
4 to her, instead stating that those documents have already been  
5 produced by CMG. When we subpoenaed Mr. Faria, the IT  
6 professional who supposedly conducted this investigation, he  
7 produced hundreds of e-mails.

8 THE COURT: But you now have them and plaintiff's  
9 counsel has admitted that the statements were not entirely  
10 accurate. You now have those e-mails, right?

11 MR. MATTHEWS: We have e-mails from Mr. Faria and then  
12 thereafter Mr. Laken, and the plaintiff supplemented their  
13 production.

14 THE COURT: What are you now missing as to Mr. Faria?

15 MR. MATTHEWS: I don't believe we are missing  
16 anything. I don't know what we are missing. I think we are  
17 missing -- I have a suspicion that we are missing internal  
18 communications between Mr. Laken and his wife and his daughter  
19 via e-mail concerning this investigation, but I don't know that  
20 at the moment, your Honor.

21 The reason why I have a suspicion, your Honor, is  
22 because the plaintiff subpoenaed its former attorney, Darren  
23 Ofsink's records because they didn't have their own financial  
24 records or corporate governance documents. Mr. Ofsink produced  
25 documents that the plaintiff produced to us. In those

1 documents are e-mails from his firm to Mr. Laken. Those  
2 e-mails have never been produced to us.

3 THE COURT: Were they privileged?

4 MR. MATTHEWS: No. There are four different directors  
5 on the e-mail and they just haven't been produced. I don't  
6 know why they haven't been produced. Each time we have to go  
7 behind the curtain to get documents from a nonparty suggests to  
8 me that Mr. Laken is withholding other documents.

9 In addition, for some reason they haven't produced  
10 financial statements after 2014. This is a publicly traded  
11 corporation that they state has ongoing business dealings yet  
12 they don't have documents from '15, '16, '17, and now '18.  
13 They are claiming that they have lost millions of dollars as a  
14 result of my client's efforts but have no way to substantiate  
15 that without providing their financial records.

16 They also continue to produce only documents that they  
17 get through subpoenas to their auditors. The suggestion that a  
18 publicly traded corporation doesn't maintain its own records is  
19 pretty unusual.

20 THE COURT: This is a public company?

21 MR. MATTHEWS: Yes, your Honor. It's a petty stock  
22 traded on the over-the-counter exchange, but it's a publicly  
23 traded company.

24 THE COURT: Does it have offices or anything, or is it  
25 just in Mr. Laken's house?

1 MR. MATTHEWS: It's in Mr. Laken's house and  
2 Ms. Laken, his daughter, her house or apartment in Brooklyn.  
3 They claim to be performing services. I don't know.

4 The situation, though, your Honor, is that each time  
5 we seek documents -- the plaintiff has produced 14 different  
6 productions. They produced hundreds of thousands of documents.

7 In fact, they produce all the documents that they  
8 claim my clients deleted. They don't produce the documents  
9 that my client has never had access to. They only do so after  
10 we file motion after motion and we have meet and confer after  
11 meet and confer.

12 Counsel and I get along well. We work earnestly in an  
13 attempt to resolve these disputes. Unfortunately, we are  
14 unable to do so. My clients have been prejudiced in that  
15 persons who were working on this matter are no longer employed  
16 by the company for which they were previously employed. We  
17 didn't have notice of it until years later. We have to file  
18 subpoenas and conduct depositions without getting documents.  
19 And they are spending thousands of dollars to review documents,  
20 reams of documents that don't have the requested information in  
21 them.

22 We have asked the Court to strike the allegations. In  
23 October I asked this Court for sanctions. The Court  
24 understandably denied the request and directed that Mr. Laken  
25 and plaintiff produce all documents within 30 days. That

1 didn't happen. I now ask the Court again to strike the  
2 allegations in the complaint concerning data deletion, American  
3 Express coded statements, and anything with regard to this  
4 purported investigation.

5 Should the Court not grant that, I ask that the Court  
6 sanction the plaintiff and reimburse my client for its legal  
7 fees in connection with these letter motions and the meet and  
8 confers and review of documents.

9 THE COURT: Mr. Lehrman.

10 MR. LEHRMAN: Thank you, your Honor.

11 I agree with opposing counsel's assessment and  
12 characterization that he and I professionally get along well.

13 I've understood, since I appeared in the case in late  
14 July of last year, what defendants' discovery plan was and  
15 strategy was, and we have, we being plaintiff counsel, along  
16 with our clients, have worked diligently since then to attempt  
17 to ensure our client's compliance with this Court's discovery  
18 order and also to work diligently to confer with defendants'  
19 counsel repeatedly and to address and cure any alleged  
20 deficiencies with respect to plaintiff's production.

21 That's why there has been this series of productions  
22 that have occurred. Not including the first production that  
23 was made by plaintiff's prior counsel that consisted of more  
24 than 590,000 documents, there have been an additional 13  
25 productions since then that myself and my cocounsel have made.



1 In terms of the IT investigation, granted Mr. Faria  
2 produced the e-mail late, but he has produced the e-mail in  
3 response to defendants' subpoena. He testified concerning the  
4 documents generally. He was examined on some of those  
5 documents. He was examined on some documents that defense  
6 counsel had confronted him with.

7 Since his deposition we, plaintiff, produced  
8 additional e-mail communications. On March 20, as part of  
9 production 11, we produced an additional 46 documents that were  
10 responsive to request 62 seeking communications reflecting  
11 plaintiff's investigation of the alleged data deletion.

12 And we have gone through in our most recent responsive  
13 letter and the declaration that we filed on behalf of Glenn  
14 Laken to try to address each of the areas raised in defendants'  
15 letter motion.

16 Since that last filing by plaintiff, which is docket  
17 entry 79 that was filed on March 16, there is additional  
18 production that's occurred, some of which defense counsel has  
19 referenced.

20 I just want to make sure the record is clear as far as  
21 what has been produced and when. On April 6, plaintiff  
22 produces as part of production set 14 the documents in total  
23 that Darren Ofsink produced to plaintiff in response to a  
24 subpoena that we had issued.

25 It's worth noting that I had had repeated e-mail

1 communications and had left repeated phone messages for  
2 Mr. Ofsink going back many months requesting these documents  
3 but was unsuccessful in obtaining any documents from  
4 Mr. Ofsink.

5 THE COURT: Was he an employee? He was counsel to XA?

6 MR. LEHRMAN: He was outside counsel to CMG.

7 THE COURT: Was he at a firm or an employee of some  
8 company?

9 MR. LEHRMAN: He was not an employee of CMG or XA, as  
10 I understand. He maintained his own private law practice, and  
11 I believe he was engaged as outside counsel by CMG.

12 Mr. Ofsink accepted service of subpoena. He produced  
13 the documents. There were 720 pages of documents he produced.  
14 We ingested them through our IT e-discovery people, Bates  
15 stamped them, and produced all of the documents, withheld none  
16 of them, to defendant on April 6.

17 Likewise, American Express statements for cards that  
18 were issued to Glenn Laken and Alexis Laken was something that  
19 the defendant had been requesting and seeking and was the  
20 subject of letter motions. Mr. Laken himself, and he addressed  
21 this in his declaration, he personally requested and obtained  
22 the statements from American Express recently. He turned them  
23 over to my firm and we produced those American Express  
24 statements as part of production No. 13, 125 pages of  
25 documents, 10 separate statements from March through December

1 2014. And I understand from Mr. Laken that that is the  
2 entirety of American Express statements that he says exist  
3 responsive to these requests.

4 Defense counsel references with respect to the unclean  
5 hands production that was sought brokerage statements. Again,  
6 just to be clear, on March 22, as part of plaintiff's  
7 production No. 12, plaintiff and Glenn Laken produced brokerage  
8 statements maintained by Infinite Alpha, Incorporated. Barbara  
9 Laken subsequently testified that that's a corporation that she  
10 owns and that she had allowed her husband to trade in  
11 securities through those accounts maintained by Infinite Alpha,  
12 Inc. Again, I believe that Mr. Laken, through his declaration  
13 and our letter response, indicated that we be making that  
14 production and we did.

15 THE COURT: Just in general, CMG brings this case  
16 alleging this massive fraud RICO conspiracy and it's been like  
17 pulling teeth to get the documents for defense counsel. Why  
18 shouldn't I order, at the very least, the fees incurred by  
19 having to bring all these letter motions?

20 MR. LEHRMAN: Thank you, your Honor.

21 THE COURT: I'm not blaming you. I think it's your  
22 clients haven't been the easiest in terms of the organization  
23 of files and things like that, is my guess.

24 MR. LEHRMAN: I appreciate that, your Honor.

25 CMG, as you indicated, and we indicated in our

1 response to the letter motion, CMG's offices are in Glenn and  
2 Barbara Laken's Chicago apartment residence. XA's offices are  
3 maintained in Alexis Laken's Brooklyn residence, in a room in  
4 that residence.

5 In part the difficulty in discovery, I believe, has  
6 been because of the nature of the claims, because of the  
7 allegations that plaintiff has made about not only what  
8 defendants did in defecting from XA, but to a rival new company  
9 that they formed, but also in the allegations that they had  
10 taken things, deleted data and left things essentially in  
11 shambles as they head out the door.

12 That, combined with XA then moving from its Manhattan  
13 offices all the way to Alexis Laken's Brooklyn residence and  
14 likewise CMG moving from wherever it was into the Laken's  
15 Chicago residence, again, between the nature of the claims and  
16 what's been alleged and the organization of CMG and XA, I think  
17 that accounts for it, and there have been discovery issues and  
18 issues of alleged nonproduction on both sides. Although we are  
19 focused now on the claims by defendant of plaintiff's  
20 nonproduction, there really have been things on both sides. I  
21 don't know why this happened, but there was a significant  
22 period of time between requests for production being made and  
23 initial production occurring. Again, that occurred before I  
24 had appeared in the case.

25 I think that there should not be any sanction and that

1 it would not be reasonable to enter a sanction of fees or any  
2 other sanction against plaintiff or third-party defendants.

3 I don't think there has been prejudice suffered by  
4 defendants. There was a delay certainly with respect to the  
5 production of Faria's e-mail, but defendants have the  
6 opportunity to continue their examination of Mr. Faria. I have  
7 offered as counsel to pay the cost of the court reporter  
8 transcription and appearance fee. There is, I don't think,  
9 additional time because they haven't examined Mr. Faria yet on  
10 those documents. I don't think there is a matter of  
11 duplicative work being done in that instance.

12 THE COURT: He is going to come back for another  
13 deposition.

14 MR. LEHRMAN: He could.

15 THE COURT: You don't control him, I guess. He's not  
16 an employee of CMG.

17 MR. LEHRMAN: He's not.

18 THE COURT: He's a third party.

19 MR. LEHRMAN: He is.

20 THE COURT: Is he still with that Radiant Group, or  
21 whatever it is called?

22 MR. LEHRMAN: Your Honor, he is not. He maintains his  
23 own business. I believe it's Far Pin Solutions. He testified  
24 he is providing ongoing IT support to plaintiff CMG and XA on  
25 an outside basis. He has been a cooperative witness. I fully

1 expect that he would agree to appear for further testimony.

2 THE COURT: Let's deal with these one at a time at a  
3 more granular level.

4 The first issue is IT and Mr. Faria. I gather  
5 defendant now has the e-mails, except the one remaining issue  
6 out there is whether there are e-mails between and among the  
7 Lakens or otherwise within CMG personnel/principals/directors  
8 about the investigation.

9 Is there anything you can tell me, Mr. Lehrman, about  
10 whether there is additional documents out there that would be  
11 in that category?

12 MR. LEHRMAN: Your Honor, so I can say, first, there  
13 was a collection of e-mail obtained from Alexis Laken, Glenn  
14 Laken, and the one other XA employee whose name escapes me at  
15 the moment. There were e-mail collected from those three  
16 custodians that were searched for responsiveness or inclusion  
17 of certain key words. And the e-mail that were responsive to  
18 those searches were produced to defendants.

19 THE COURT: And those responsiveness search terms  
20 included things related to the IT investigation of what is  
21 alleged in the complaint?

22 MR. LEHRMAN: I don't believe they did. I don't  
23 believe that the searches that were previously performed  
24 included such search terms.

25 So what I would propose now, and I have spent some

1 time now going back and digging through the methodology that  
2 was employed, what I would propose to do would be to now  
3 further review the search method that was performed, propose a  
4 new revised search methodology to capture or identify e-mail  
5 that are appropriately responsive about the investigation of  
6 deletion and restoration.

7 THE COURT: Why don't do you that. Why don't you  
8 confer on search terms within a week and get any production  
9 within a month. Does that work? Is that doable?

10 MR. LEHRMAN: It is doable for plaintiff, yes, sir.

11 THE COURT: And defendants.

12 MR. MATTHEWS: The timing should be acceptable, your  
13 Honor. It's the concern whether that really does remedy the  
14 harm that has already occurred.

15 THE COURT: I am going to reserve on that, and I am  
16 going to reserve on any sanctions or spoliation issues or  
17 whatever else you want to raise for now because discovery is  
18 still open, you have until the end of June to do depositions.  
19 If you need to call someone back, you can call them back. If  
20 you can establish prejudice in any form, I will consider it,  
21 but I am not sure what the prejudice is other than attorney  
22 costs, which is what it is.

23 MR. MATTHEWS: It's expensive is what it is.

24 THE COURT: I know. Who is paying for fees?

25 MR. MATTHEWS: My clients.

1 THE COURT: When you say your clients, I guess that  
2 includes Hudson -- what is it, Hudson?

3 MR. MATTHEWS: Hudson Gray is the entity.

4 THE COURT: Hudson Gray, which is the place that  
5 supposedly, the individuals from XA decamped to, right?

6 MR. MATTHEWS: It's a company that one of the  
7 employees resigned, formed, and ended up employing the other  
8 employees.

9 THE COURT: That new entity is operating and making  
10 money?

11 MR. MATTHEWS: It's operating, yeah. It earns money,  
12 sure.

13 THE COURT: They are paying your fees. It's not  
14 insurance or anything.

15 MR. MATTHEWS: It's not insurance.

16 THE COURT: They are paying your fees.

17 Next category is corporate governance documents. What  
18 are you still missing in that category, Mr. Matthews?

19 MR. MATTHEWS: On the corporate governance documents,  
20 your Honor, we have been provided just within the last week or  
21 so with Mr. Ofsink's file, which includes board resolutions and  
22 certain actions with respect to that. We have not yet been  
23 provided with documents in response to request No. 34, which  
24 concerns Glenn Laken's election or appointment to the CMG board  
25 or any position that he has held has not been provided with the



1 consulting agreement.

2 THE COURT: Hold there. Do you know, Mr. Lehrman, if  
3 those documents exist?

4 MR. LEHRMAN: I had thought, and I have not had a full  
5 chance to fully review the production from Mr. Ofsink, but I  
6 had thought that production would include documents responsive  
7 to request 34 that Mr. Matthews --

8 THE COURT: Have you been able to look, Mr. Matthews,  
9 to figure out if they are actually missing from the latest  
10 production?

11 MR. MATTHEWS: They are not in the production, your  
12 Honor.

13 THE COURT: Do one other follow-up in the next week,  
14 Mr. Lehrman, and see if it exists. If you represent they don't  
15 exist, then the case will go forward as if they don't exist.

16 MR. LEHRMAN: Yes, your Honor.

17 THE COURT: Any other corporate governance documents?

18 MR. MATTHEWS: Any meeting minutes, resolutions  
19 concerning this litigation, which is request No. 41. This is  
20 articulated on page 3 of my letter of March 13, 2018.

21 THE COURT: Mr. Lehrman, anything more about that that  
22 you know? Would that also be in counsel's files, supposedly?

23 MR. LEHRMAN: Again, similarly, I would expect that it  
24 would be, from my understanding of what would be included in  
25 Mr. Ofsink's production. So I think generally with respect to

1 those requests I need to fully review the production made by  
2 Mr. Ofsink so I can comment on whether we contend something is  
3 included or not included in that production.

4 MR. MATTHEWS: Your Honor, I reviewed Mr. Ofsink's  
5 production with my clients, and I know that it's not complete  
6 because Mr. Ofsink was responsible for negotiating the February  
7 release agreement whereby CMG released Joe Wagner in exchange  
8 for valid consideration and none of that or communications with  
9 respect to that is in the production.

10 Again, the issue is that they are just trying to get  
11 documents from their former attorney who now may no longer  
12 practice law, for all I know, rather than searching their files  
13 and making a full production. Considering that Mr. Ofsink has  
14 produced e-mails to Mr. Laken at his Gmail address that  
15 Mr. Laken has not produced, it seems to me he hasn't yet  
16 reviewed his own e-mail.

17 THE COURT: I think you are going to have to do  
18 another sweep that includes that as well.

19 MR. LEHRMAN: Your Honor, as part of the additional  
20 e-mail production that we discussed earlier I will make sure  
21 that we include and can first confer with Mr. Matthews about  
22 the methodology for collecting and reviewing e-mail from Glenn  
23 Laken that would be responsive to the specific request  
24 concerning e-mail between Mr. Laken and Darren Ofsink and these  
25 particular issues.

1 THE COURT: That's right. I do want you to do that.  
2 But not just e-mails. I want you to check to see if he has the  
3 files in any form that would cover these corporate governance  
4 issues that haven't yet been produced.

5 MR. LEHRMAN: Yes, your Honor. I will discuss that  
6 again with Mr. Laken certainly and address that with  
7 Mr. Matthews.

8 THE COURT: Mr. Matthews, what about the CMG financial  
9 and oversight documents? Have you gotten more of those?

10 MR. MATTHEWS: We have gotten some of those, your  
11 Honor. We still haven't gotten documents from 2015, '16, and  
12 '17. Counsel has told me in the past that they were attempting  
13 to get documents from CMG's auditors. I don't know what the  
14 final resolution of the attempts to get the documents from  
15 Anderson and Bradshaw are. I do know that we have not yet  
16 received communications or actual records concerning their  
17 financial documents. My clients provided to a CMG  
18 representative, when they were employed by XA, on a quarterly  
19 basis, XA financial statements. That was presented to CMG's  
20 auditors. Those documents haven't been produced in full. I  
21 don't know why they haven't.

22 Those documents go to the very heart of the  
23 allegations in this case. They claim that my clients were  
24 committing a fraud and that they were siphoning money off to  
25 different entities. We contend and can establish that we

1 produced to a CMG board of directors member each and every  
2 quarter the actual financial statements for XA that were used  
3 to produce CMG's financial statements that were published in  
4 the form of 10-Qs periodically.

5 Now, CMG, under Mr. Laken, no longer actually  
6 publishes its financial statements, but those prior documents  
7 should be in their files and should be produced.

8 THE COURT: Mr. Lehrman, do you want to respond to  
9 that?

10 MR. LEHRMAN: With respect to production, that  
11 plaintiff has sought, plaintiff has served a subpoena on  
12 Anderson Bradshaw, one of CMG's prior auditors. Anderson  
13 Bradshaw has objected. I've had extensive meetings and  
14 conferrals with Anderson Bradshaw's counsel in Salt Lake City,  
15 Utah. We have not reached any agreement. There has been no  
16 production made by Anderson Bradshaw received by plaintiff.

17 THE COURT: Anderson Bradshaw was what again?

18 MR. LEHRMAN: They were an auditor. They audited  
19 CMG's 2014 financial statements.

20 THE COURT: You are trying to get them from them.

21 MR. LEHRMAN: Correct.

22 THE COURT: The plaintiff and principals of plaintiff  
23 do not have these, is that correct?

24 MR. LEHRMAN: That is. Plaintiff had previously  
25 produced the audited financial statements and work papers of

1 another auditor, Malone Bailey.

2 THE COURT: Then it switched for the later years.

3 MR. LEHRMAN: Yes, your Honor.

4 THE COURT: Where do things stand?

5 MR. LEHRMAN: We attempted to serve a subpoena on  
6 another auditor, John Scrudato. We were not able to effect  
7 service on Mr. Scrudato on what's published as his business  
8 address, former business address. We have not obtained any  
9 production from Mr. Scrudato.

10 As Mr. Matthews indicates, CMG stopped publishing  
11 financial statements. Mr. Laken, through his declarations, is  
12 attempting to address kind of the extent of his efforts and his  
13 ability to obtain and produce documents in his possession,  
14 custody, and control. So we don't have possession or custody  
15 of other financial statements other than what's been produced.

16 THE COURT: Mr. Matthews, what is your ask from me?

17 MR. MATTHEWS: I think that the allegations in the  
18 complaint should be stricken. If they have no ability to  
19 produce the financial records that my clients themselves gave  
20 to CMG while they were employed there, they shouldn't be able  
21 to impugn my clients with allegations that they were siphoning  
22 monies off to themselves and to other entities and to their  
23 subsidiaries if we cannot cross-examine them on this.

24 THE COURT: What allegations are you asking to be  
25 stricken?

1 MR. MATTHEWS: I want to ask that all the allegations  
2 with respect to payments to the defendants themselves, payments  
3 to Studio AG, payments to Nick's company be stricken from the  
4 complaint because, your Honor, if we had an opportunity to  
5 review the XA financial statements, they would show, for  
6 example, payments to Studio AG in the ordinary course of  
7 business because Studio AG was a vendor, and there are some  
8 documents that show that the defendants luckily have in their  
9 own possession, but for some reason the plaintiffs don't have  
10 them, even though they were the repository of them.

11 MR. LEHRMAN: Your Honor, it touches on an interesting  
12 issue. Defendants, who all resigned from their employment with  
13 XA and then most of whom became employed by Hudson Gray,  
14 somehow or another retained possession of various documents and  
15 data belonging to XA. We know this in part because it was  
16 produced back to us by defendants in the course of this  
17 litigation.

18 Those documents include documents that would be  
19 responsive to some of these requests for financial information  
20 or financial statements. We know that bank statements from XA  
21 have been produced. They were Parkway Bank statements,  
22 including copies of checks, including reconciliations, which  
23 are a type of financial statement that were maintained by XA.

24 THE COURT: From before they left.

25 MR. LEHRMAN: Correct. From before they left.

1 THE COURT: Did XA continue to operate at all after  
2 they left?

3 MR. LEHRMAN: XA is continuing to operate and is  
4 operating now but is not, as I understand it, producing the  
5 significant events that it once did during defendants' tenure.  
6 For example, the NBC upfront events, big event, multimillion  
7 dollar job performed year after year, that's not something that  
8 XA has performed since defendants' departure.

9 MR. MATTHEWS: I'd like to note for the record, your  
10 Honor, that the Parkway Bank documents have been produced  
11 because we issued a subpoena to Parkway Bank and received two  
12 disks of documents, and I provided those to prior counsel.

13 There are certain documents that defendants retained,  
14 again, luckily, when they left and certain of those were backup  
15 e-mails that the defendants, whose job it was to run this  
16 business, had in their possession. And within one month of one  
17 employee resigning, the first lawsuit was filed against the  
18 defendant, so they needed these documents to disprove the  
19 allegations. I just want the record to be clear as to the  
20 reason for that.

21 THE COURT: Your argument, Mr. Matthews, is that none  
22 of the financial documents are still in the possession of  
23 plaintiffs, so I should strike all these allegations in the  
24 complaint.

25 MR. MATTHEWS: My argument is that they willfully

1 refused to produce documents that are contrary to their claims.

2 That's my argument.

3 THE COURT: Are you saying they have them and won't

4 produce them or that they destroyed them?

5 MR. MATTHEWS: I don't know what they did with them.

6 I know they were produced to them between the years 2009 and  
7 2014 and now they say that they don't have them. In 2016, they  
8 stated in response to discovery requests that they will produce  
9 documents, subject to that waiver of objections, that they will  
10 produce responsive, nonprivileged documents in their  
11 possession.

12 THE COURT: Which financial documents have you not  
13 received?

14 MR. MATTHEWS: We don't have anything from 2015  
15 forward. We only have some of the documents while my clients  
16 were employed there, which is, for these purposes, 2009 to  
17 2014. The 2015 forward documents would demonstrate what  
18 damages, if any, plaintiff would be entitled to if they can  
19 establish liability. The 2009 to 2014 documents will  
20 demonstrate that they actually had them in their possession  
21 because my clients provided it to them, which is not the way  
22 one commits a fraud.

23 THE COURT: But you have some of the '09 to '14  
24 documents.

25 MR. MATTHEWS: Yes.



1 THE COURT: I just don't have a clear enough record, I  
2 don't think, to strike allegations at this point. You'll have  
3 to be a little more detailed about what was requested and what  
4 was not produced and how it's relevant for me to actually  
5 strike allegations.

6 MR. MATTHEWS: Will we have an opportunity to make a  
7 motion with a full briefing record on that, your Honor?

8 THE COURT: Sure.

9 Mr. Lehrman, I guess, while you are shaking the trees  
10 for any other documents, you should cover that as well.

11 MR. LEHRMAN: Yes, your Honor.

12 THE COURT: Let's go off the record for a second.

13 (Discussion off the record)

14 THE COURT: We were just discussing the relationship  
15 between the discovery deadlines and settlement conference  
16 timing. The current fact discovery deadline, including  
17 depositions, is June 29.

18 I am now going to have the parties go forward with  
19 paper discovery but I'm extending the deposition deadline to  
20 the end of July with the expectation and hope that the parties  
21 will be able to have a settlement conference next month, May.  
22 And by giving a little more time for depositions the parties  
23 can, to some extent, limit the attorney's fees between now and  
24 the settlement conference. However, the parties will go  
25 forward with supplementing discovery, as we have been

1 discussing.

2 Now we will go back to the issues on discovery,  
3 Mr. Matthews.

4 MR. MATTHEWS: Thank you, your Honor.

5 Our request No. 13 sought all American Express coded  
6 statements for charges incurred by Jeff Devlin, Ronald  
7 Burkhardt, Alexis Laken and Glenn Laken submitted to XA for  
8 payment or reimbursement.

9 In December 2016, plaintiff objected to the production  
10 of documents with respect to Ms. Laken and Mr. Laken and agreed  
11 to produce these coded statements for Mr. Devlin and  
12 Mr. Burkhardt.

13 These are not American Express statements that one  
14 receives in the mail or via electronic delivery identifying all  
15 of their charges. Those statements that were modified and  
16 submitted to XA for payment and/or reimbursement to the  
17 individual and a job code was put on the document so that the  
18 company's accounting office could determine, all right, this  
19 charge should be allocated to project 1, this charge should be  
20 allocated to project 2, and client 3, etc.

21 THE COURT: Whose American Express accounts are you  
22 talking about?

23 MR. MATTHEWS: When my clients were employed by XA,  
24 the company didn't have corporate credit cards.

25 THE COURT: You are talking about Mr. Lehrman's

1 complaint about your production.

2 MR. MATTHEWS: No. I'm actually talking about -- I  
3 apologize, your Honor. I was trying to show how it is.

4 When my clients were employed by XA, they used their  
5 own personal credit cards and coded them and the company paid  
6 these monies to American Express. When Mr. Laken,  
7 Mr. Burkhardt, Mr. Devlin, and Ms. Laken became involved in the  
8 business, they did the same and they also had corporate cards.

9 Mr. Lehrman and plaintiff just made a production of  
10 American Express statements for this period of time March to  
11 December 2014. That's not what we are looking for. We are not  
12 looking for the entirety of their American Express statements.  
13 We are looking --

14 THE COURT: The equivalent of what you produced, your  
15 people produced?

16 MR. MATTHEWS: Right. To show that this was the  
17 established practice in the office and that what we did was not  
18 fraudulent. We still haven't gotten those coded statements,  
19 sir.

20 THE COURT: Mr. Lehrman, do you have an update on  
21 that?

22 MR. LEHRMAN: Thank you, your Honor.

23 So as part of the initial 590,000-page production  
24 there were 26 documents that were responsive to that request.  
25 As part of production of set 5 that was made on November 22,

1 2017, there were five documents responsive to request 13. And  
2 then on February 15, 2018, in production 8, there were 53  
3 documents responsive to this request No. 13.

4 There were a total of 84 documents that plaintiff has  
5 produced that were identified as being responsive to that  
6 request. I believe that several dozen of those documents were  
7 coded statements, as Mr. Matthews has described, meaning that  
8 they are not actual credit card statements. They are  
9 essentially a spreadsheet identifying certain charges from a  
10 certain billing period.

11 MR. MATTHEWS: If Mr. Lehrman can provide us with the  
12 Bates numbers. Since the keys that have been represented to be  
13 included in the production to identify the document request to  
14 which the documents are responsive do not work, the Bates  
15 numbers would be very helpful.

16 THE COURT: Could you do that.

17 MR. LEHRMAN: I would be -- yeah, absolutely, I can do  
18 that.

19 To clarify, perhaps not in the first production set,  
20 but in the subsequent production sets that my firm has made, we  
21 have provided a load file, which is a data file that identifies  
22 for each document being produced one or more document requests  
23 to which the document responds.

24 So I understand from counsel there might be a  
25 technical issue that they are experiencing being unable to read

1 that code and have the benefit of the use of that code, we have  
2 in the past had at least one, if not more conferrals between  
3 plaintiff's e-discovery provider and defendants. Certainly, we  
4 are happy to continue those discussions, but in the interim I  
5 will provide Bates references to the previously produced coded  
6 statements.

7 MR. MATTHEWS: Thank you.

8 The last issue that is addressed in general, your  
9 Honor, is with respect to the unclean hands defense.

10 Mr. Lehrman accurately recited what has been produced to date,  
11 these Infinite Alpha trading records, but they stopped at the  
12 end of 2014. I don't know why Mr. Laken hasn't produced either  
13 Infinite Alpha trading records through 2018, because we allege  
14 that those are relevant to our defenses, or some other vehicle  
15 through which he made trades concerning the CMGO stock and the  
16 other companies that are identified in the request for  
17 production.

18 MR. LEHRMAN: Your Honor, Mr. Laken in his  
19 declaration, dated March 16, 2018, that's docket entry 79-1,  
20 addresses on an unclean hands defense portion of his  
21 declaration these Infinite Alpha brokerage statements that he  
22 obtained from his wife, that he had her produce them and that  
23 he does not have possession or custody of additional documents  
24 responsive to these requests.

25 I believe also that Barbara Laken during her

1 deposition, recent deposition testimony, I believe that she  
2 offered some testimony about why there were not additional  
3 brokerage statements available to her. We've produced what  
4 plaintiffs have in their possession and custody. They don't  
5 believe they have control of other statements because they are  
6 unable to access the brokerage accounts.

7 THE COURT: Why would they not be able to access their  
8 brokerage account?

9 MR. LEHRMAN: For accounts that were closed. Some of  
10 these brokerage accounts have since been closed. So they no  
11 longer have online access to those accounts.

12 THE COURT: Mr. Matthews.

13 MR. MATTHEWS: What is missing from Mr. Laken's  
14 declaration is a statement that he no longer trades in the  
15 account of CMGO or that he stopped trading in the account of  
16 CMGO -- in the stock of CMGO, rather, at the end of 2014. This  
17 is a professional stock trader. That's what he did for a  
18 livelihood. He amassed a position of CMGO's stock such that he  
19 could take over the board of directors.

20 Again, the suggestion that he suddenly stopped trading  
21 it when he became the CEO and became the chairman of the board  
22 is incredible, and now, all of a sudden, he closes his trading  
23 accounts and doesn't have access to those --

24 THE COURT: I don't buy it. He is ordered to produce  
25 all documents reflecting any trading in CMGO, documents

1 involving his trading or trading of entities or persons he  
2 controlled within one month.

3 MR. LEHRMAN: Your Honor, may I ask for clarification.  
4 All trading of any securities or all trading of CMG stock?

5 THE COURT: CMG stock. That's what you are asking  
6 for, right, Mr. Matthews?

7 MR. MATTHEWS: That's correct, your Honor. We asked  
8 for the CMG stock. We also asked for companies under different  
9 stock tickers, RGIN and others that are in our request for  
10 production.

11 THE COURT: What is RGIN?

12 MR. MATTHEWS: It was a biotechnology company.

13 THE COURT: How is it related?

14 MR. MATTHEWS: According to Darren Ofsink's letter,  
15 Mr. Laken was trading stocks under the name of Sol Mlot, under  
16 an account controlled by Sol Mlot, and he was sharing in the  
17 proceeds, profits, or losses of those trades, one of which was  
18 CMGO, and he was doing this at a time when he was supposedly a  
19 consultant to the corporation to restructure it.

20 It is akin to the posts that Mr. Laken has admittedly  
21 made on the CMGO investor hub website under a pseudonym where  
22 he claims not to be Mr. Laken himself and yet is disclosing and  
23 making statements to the Internet that people should hold onto  
24 the stock because they are going to receive \$20 million as a  
25 result of this lawsuit. We think it's part and parcel of his

1 scheme to use this lawsuit as a means to prop up the stock of  
2 CMGO.

3 The other stocks that we sought are at No. 33: RGIN,  
4 MDNT, SIBE, AEYE, and TNIB. It's request No. 33 of our  
5 production for production, your Honor.

6 MR. LEHRMAN: Your Honor, there was a previous  
7 production that Mr. Laken made with respect to those requests,  
8 and I think Mr. Matthews' response was essentially that he  
9 didn't believe that that was the complete production that  
10 Mr. Laken had possession, custody, and control over.

11 I think that with respect to that document request and  
12 the further production that the Court has ordered, certainly we  
13 will address that, but I anticipate that it's likely that there  
14 is going to be just a more detailed declaration from Mr. Laken  
15 that, in part, is going to be provided in response because I've  
16 had extensive conversations with Mr. Laken about collecting  
17 documents and complying with the Court's order satisfying the  
18 document request. It's going to be surprising to me if there  
19 is some substantial additional documents that exist and have  
20 not been produced.

21 THE COURT: He traded, say, in 2016 in one of these  
22 stocks. The fact that the brokerage account is closed doesn't  
23 mean he doesn't have control over it. He can get the documents  
24 showing his trading, right?

25 MR. LEHRMAN: Yes, your Honor.



1 THE COURT: So he has to do that.

2 MR. LEHRMAN: Understood.

3 THE COURT: What else?

4 MR. MATTHEWS: I believe that addresses all the issues  
5 that we have raised in our letters, your Honor.

6 THE COURT: What about anything else from you,  
7 Mr. Lehrman?

8 MR. LEHRMAN: Thank you, your Honor.

9 We had filed a letter motion that was docket entry 80,  
10 which I understand had been denied by the Court without  
11 prejudice.

12 THE COURT: Sorry. Which one was this?

13 MR. LEHRMAN: Docket entry 80, which was plaintiff's  
14 letter motion addressing issues of nonproduction or deficient  
15 production on the defendants' side.

16 I'm just raising that I saw that the Court had, I  
17 think, denied the letter motion without prejudice and to be  
18 renewed. We had not renewed it. I, frankly, was waiting for  
19 the e-mail production from defendants that's I believe  
20 forthcoming so that I could renew the motion along with any  
21 issues related to defendants' e-mail. For purposes of judicial  
22 economy I'm happy to wait to do that or to address it now.

23 THE COURT: That's fine. We can wait to do that. I  
24 think that makes sense, if that's all right with everybody.

25 I'll do two orders. One will be a referral to the

1 magistrate judge for a settlement conference. The second will  
2 be an order just confirming that the fact deposition deadline  
3 is extended to July 31.

4 MR. MATTHEWS: Thank you, your Honor.

5 THE COURT: Anything else for today?

6 MR. LEHRMAN: No, your Honor.

7 THE COURT: Thank you very much. We are adjourned.

8 (Adjourned)